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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 709

CHENERY CORPORATION, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 317-326) has not yet been reported. This Court's prior denial of certiorari is reported at 340 U.S. 831. The opinion of the District Court is reported at 87 F. Supp. 289. The opinion and findings of the District Court appear at R. 52-68.[1] The findings and opinion of the Commission

[1] The letter "a" which is included as part of the number of each page of the Joint Appendix in accordance with the rules of the Third Circuit has been omitted herein.

(R. 7-31) are reported in Holding Company Act Release No. 8313, and the supplemental findings and opinion of the Commission (R. 34-38) are reported in Holding Company Act Release No. 8387.

JURISDICTION

The judgment of the court below was entered on April 2, 1951 (R. 327). Petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming an order of the district court approving and enforcing pursuant to Section 11(e) of the Holding Company Act a plan for the liquidation of a holding company which, as approved by the Commission in 1948, accorded petitioners the precise amount which the Commission had approved in an earlier plan for the reorganization of predecessor companies in the 1945 order affirmed pursuant to this Court's mandate in *S. E. C.* v. *Chenery Corporation,* 332 U. S. 194 (the second *Chenery* case).

STATUTES INVOLVED

Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79k(e) and 79r(f) are printed in the petition at pages 2-4.

STATEMENT

An understanding of the issues presented by this petition will be facilitated, we believe, by distinguishing two separate administrative proceedings in which petitioners have participated; first, a reorganization

or merger proceeding—twice before this Court—affecting stockholders of the former Federal Water Service corporation,[2] and, second, the instant proceeding for court enforcement of a later plan for the liquidation of Federal Water and Gas Corporation, the company which survived the merger.

On March 24, 1941, the Commission issued findings in the merger proceeding indicating approval of Federal's then proposal with respect to the allocation of the new common stock among the public security holders of the old company, but disapproving the plan in its then form insofar as it provided for participation, on a basis of parity with the old company's other preferred stock, of preferred stock purchased individually by the management (Chenery et al.) during the course of the proceeding (R. 93.)[3]

Thereupon a new Paragraph Fourth (d) was added to the merger agreement, providing that Chenery et al. were to receive no new stock in respect of their preferred shares purchased after November 8, 1937,[4] but merely cash equal to their cost plus interest at 4%

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[2] The prior proceeding involved the merger into Federal Water Service Corporation of its parent company, Utility Operators Company, and a wholly owned subsidiary, Federal Water and Gas Corporation, the creation of a simplified capital structure consisting of debt and common stock only, and the renaming of the surviving corporation as Federal Water and Gas Corporation.

[3] *Federal Water Service Corporation*, 8 S.E.C. 893 (1941).

[4] Prior to registration in November 1937, including the months immediately prior to registration when reorganization plans were being formulated and discussed, Chenery et al. had also purchased shares of the preferred stock of Federal Water Service Corporation. Certain of those purchases were criticized by a stockholder who participated in the merger proceeding (R. 140), but those shares were permitted to participate on a parity with publicly held shares (R. 135), and the treatment accorded them is not now in dispute.

to the effective date of the merger agreement. The merger plan as so amended was approved by the Commission over the objection of Chenery et al. on September 24, 1941 (R. 117).[5]

The merger plan did not contemplate court enforcement but was to be consummated under state merger procedure requiring a favorable vote of each class of stockholders affected. Accordingly, Section 11(g) of the Holding Company Act subjected to Commission supervision the company's solicitation of votes for the plan and required distribution in connection therewith of a report by the Commission on the plan. Such a report was distributed along with a letter from C. T. Chenery as President of the Company. Both this letter (R. 121) and the Commission's report (R. 117-118) discussed the Commission's decision, described the new provisions of the merger agreement limiting Chenery et al., in respect of the stock in controversy, to cost and interest, and referred to the possibility of proceedings to review that decision. The letter refers to the plan as one "which required all persons [connected with the management] who, after November 8, 1937, purchased Preferred stock * * * to surrender the stock so purchased to the Corporation" at cost plus 4% per annum (R. 122), but notes:

> If, on appeal by such officers or directors, it should be held that the Securities and Exchange Commission has acted illegally and beyond its authority in this matter, it is believed that such Preferred stock should be permitted to participate in the reorgani-

[5] *Federal Water Service Corporation*, 10 S.E.C. 200 (1941).

zation on the same basis as other Preferred stock [R. 124].

At the stockholders' meeting of the corporation, Chenery et al. accompanied their votes against the merger with letters which stated, *inter alia:*

> * * * I hereby state with the intention that this statement should be relied upon by the Board of Directors of Federal Water Service Corporation in deciding whether to declare the merger agreement operative that
>
> (1) *if,* in the proceeding taken by the interveners to review the order of the Securities and Exchange Commission, *it is finally determined that said order shall be affirmed, I will surrender my stock* referred to in paragraph FOURTH (d) of the merger agreement to the surviving corporation *for cancellation* for the consideration set forth in paragraph FOURTH (d) of the merger agreement; [R. 126-127. Emphasis supplied.]

A requisite majority of the stockholders voted favorably on the plan, the directors declared it operative, and on October 31, 1941 the merger was fully consummated (R. 125). The old stocks of the merging companies were cancelled, and the new common stock of Federal Water and Gas Corporation was issued. Thus the statement by petitioners (p. 16) that they hold preferred stock in Federal Water Service Corporation is true only in the sense that they are in physical possession of certain old certificates.

Upon a petition for review filed by Chenery et al., this Court held that the equitable precedents relied

upon by the Commission were inapplicable, intimated that the Commission's order might perhaps be sustainable upon grounds not explicated in its opinion, and ordered the case remanded to the Commission for further proceedings not inconsistent with this Court's decision. *S. E. C.* v. *Chenery Corporation,* 318 U. S. 80.

After the remand the surviving company, of which C. T. Chenery was (and still is) the principal executive officer, proposed an amendment to the merger plan based upon the view that the first *Chenery* case required the Commission to accord Chenery et al. equal treatment with public holders of the preferred stock of the old company. In 1945 the Commission entered a new decision (R. 131-173, 63) [6] rejecting that amendment and reapproving the merger plan as of September 24, 1941, in the form which had been approved in the 1941 order set aside in the first Chenery litigation. The Commission stated that the decision was based upon its administrative judgment and experience as applied to the specific facts of the case. Upon review this Court on June 23, 1947, upheld the Commission's action and remanded the case to the Court of Appeals for the District of Columbia for the entry of a judgment and decree. *S. E. C.* v. *Chenery Corporation,* 332 U. S. 194.

On July 16, 1947, Chenery et al. (R. 177) and Federal Water and Gas Corporation (R. 174) filed petitions for rehearing in this Court. On October 8, 1947, Federal Water and Gas Corporation filed with this Court a supplement to its petition for rehearing (R. 179). In

[6] *Federal Water Service Corporation,* 18 S.E.C. 231 (1945).

these petitions substantially the identical arguments were presented that now form the basis for the present petition. Chenery argued then that this Court "has made no holding as to whether or not the provision of the plan whereby the Chenery Corporation and the other interveners are required to surrender their stock at cost plus four per cent interest is 'fair and equitable'" (R. 177). The same *Cities Service* and *American States* decisions, which petitioners here allege to be inconsistent with the Commission's *Chenery* decision, were cited to this Court, and it was argued:

> In view of these decisions * * * we do not see how this Court can allow its decision in the *Chenery Corporation* case to stand. There has been what may be described as an administrative hoax. * * * These new decisions on the part of the Commission sweep away the entire basis for this Court's decision and raise new questions as to the interpretation of this Court's opinion which, it is respectfully submitted, should be settled by this Court. [R. 180-181].

The petitions for rehearing were denied on October 13, 1947. 332 U. S. 783.

On July 22, 1947, this Court issued its mandate to the United States Court of Appeals for the District of Columbia (R. 178). On or about October 23, 1947, the Clerk of the Court of Appeals submitted to all counsel a draft of a proposed judgment and decree fully affirming the Commission's order (R. 181). Counsel for Chenery et al. and for Federal Water and Gas Corporation opposed the proposed judgment and decree (R.

182-189), and urged that the case be either remanded to the Commission "for further proceedings in conformity with the opinion of the Supreme Court" (R. 182, 189) or that the Commission's order only be affirmed "in so far as it denied the application of Federal Water and Gas Corporation for leave to amend the merger agreement." (R. 183). They stated that if the Court should affirm the Commission's order of February 7, 1945, "It will no doubt be contended by the Securities and Exchange Commission that the judgment of the Supreme Court is res adjudicata as to the fairness and equity of the corporation's depriving the interveners of their stock upon payment of cost plus 4% interest." (R. 186). The Commission filed with the Court of Appeals a memorandum in opposition to these suggested modifications of the proposed judgment and decree (R. 189), urging the issuance of a decree and mandate constituting a full affirmance of the Commission's order. The Commission stated:

> Of course, the Commission would contend that affirmance of its order under review would be a conclusive determination of the fair and equitable issue. * * * The fact that affirmance would under the statutory scheme give finality to the Commission's order is, we submit, an additional reason for entering an order of affirmance unless there appears to be some warrant for setting aside the order, and, as stated above, we believe that the Supreme Court's opinion precludes a reversal in whole or in part. [R. 199.]

On December 12, 1947, the Court of Appeals entered a decree and mandate in substantially the form originally proposed and in accordance with the Commission's recommendation, which set aside and annulled its prior reversal of the Commission's order and provided:

> IT IS FURTHER ORDERED AND DECREED by this Court that the order of the Securities and Exchange Commission issued February 7, 1945, in these cases be, and is hereby, affirmed. [R. 65.]

The final step in connection with the merger proceeding was a petition dated January 19, 1948, by Chenery et al. to the Commission for rehearing, reconsideration, and modification of its order of February 7, 1945 (R. 93). This was denied by the Commission by order dated February 5, 1948 (R. 201). No review of that order was sought.

Meanwhile on December 31, 1942, the new Federal Water and Gas Corporation, created by the 1941 merger, had filed with the Commission a plan pursuant to Section 11(e) of the Act under which it would cease to exist by dissolution or otherwise. The proceeding on said plan was consolidated with proceedings instituted by the Commission with respect to the new corporation pursuant to Section 11(b) of the Act. Parts of said plan were approved by order of the Commission dated February 10, 1943.[7] A number of supplemental plans, applications, and declarations, not now in dis-

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[7] *Federal Water and Gas Corporation*, 12 S.E.C. 766.

pute, were filed in the consolidated proceedings and were acted upon by the Commission from time to time.

On November 7, 1947, Federal Water and Gas Corporation filed with the Commission pursuant to Section 11(e) of the Act, an Amended and Supplemental Plan providing specific steps to accomplish its dissolution. This dissolution plan of the new corporation, filed subsequent to this Court's decision in the second *Chenery* case, treated as still undecided the amount that Chenery et al. should receive by virtue of their former interest as preferred stockholders in the old company (R. 5-6).

On July 2, 1948, the Commission entered its Findings and Opinion (R. 7-32) in the dissolution proceeding, finding that the plan could be approved if amended in certain respects, including a provision for payment to Chenery et al. of the amount determined in the merger proceeding.[8] The Commission stated that "there has been a final determination upheld on judicial review, that the payment of $313,190 in full satisfaction of the claims of Chenery et al. would be fair and equitable" (R. 18), and that "the original security claims of Chenery et al. have been transmuted into and must now be regarded as claims against Federal for an amount of $313,190" (R. 18). The Commission held that even if the principle of *res judicata* were not a bar to re-examination of the question, and even if the matter were one in which, due to changed conditions, the exer-

[8] Such payment was to constitute full discharge of all claims of Chenery, et al., unless they should succeed in having the Commission decision overruled by the courts in this proceeding for enforcement of the dissolution plan (R. 23).

cise of discretion and reconsideration were permissible, there were no such new considerations or circumstances which would require a different result (R. 19). The dissolution plan as subsequently amended to conform to that opinion was approved by the Commission on July 27, 1948 (R. 34).

On July 28, 1948, the Commission applied to the District Court of the United States for the District of Delaware for enforcement of the plan (R. 3). On August 19, 1948, Judge Leahy of that Court, without opposition, ordered enforcement of the plan in all respects except as to Section 3 of the amended plan which provided that the payment by Federal of $313,190 to Chenery et al. would be in full satisfaction of their claims (R. 1). Hearings on that issue were held on October 25, 1948, and September 16, 1949. On December 2, 1949, Judge Leahy entered a memorandum opinion (R. 52), holding himself bound by this Court's decision to find the plan fair and equitable and enforce it, but stating:

> Consequently, if I did not think I were foreclosed by the Supreme Court, as detailed above, I would have no hesitation in holding there is no substantial evidence to support the Commission's finding that Chenery should be penalized and limited to cost plus interest for its preferred stock purchases [R. 57].

On January 11, 1950, the District Court issued an order (R. 58) approving Section 3 of the plan as fair and equitable and appropriate to effectuate the pro-

visions of Section 11 of the Act and ordered the plan enforced. Petitioners appealed from that order to the Court of Appeals for the Third Circuit, and then petitioned this Court for certiorari before hearing by the Court of Appeals, which petition was denied on October 9, 1950. After review by the Court of Appeals, it affirmed the order of the district court on April 2, 1951. The present petition is for review of that decision.

ARGUMENT

The court below properly held that the doctrine of *res judicata* was applicable to this much litigated case. Petitioners' contention that the Commission has abandoned in subsequent decisions the doctrine enunciated in *Chenery* is unfounded. There is no conflict of decisions. We think it high time that this litigation involving transactions occurring between 1937 and 1940 was brought to a close.

1. The Commission did not err in refusing to reexamine and modify, assuming it had power to do so, the decision which was affirmed, in response to the mandate of this court in the second *Chenery* decision. Petitioners' sole ground for reopening the earlier decision is the contention that subsequent administrative rulings involve an abandonment of the "rule" which the Commission applied to Chenery et al. This argument—apart from its irrelevance—rests upon a misinterpretation of Commission decisions, of which the more significant were called to the attention of this Court in connection with the petition for rehearing in the second *Chenery* case.

The Commission has not abandoned the view that actual wrongdoing need not be proved; it has merely held that absent actual wrongdoing, the degree of conflict of interest and the likelihood of harm to public investors may be examined in the individual case, and that when the conflict is less acute than in the *Chenery* situation, a different result may be justified. Thus the *Cities Service* opinion, after carefully examining the facts, refers to "the conclusion we have reached that the trading here involved did not create a conflict as acute or carry as great a degree of potential danger in [*sic*] the interests of other investors and to the integrity of the reorganization process as that created by the concerted purchase program involved in the *Federal Water Service* case." (R. 222-223). Indeed, the *Chenery* case itself recognized that the problem was one of degree.[9] The Court is respectfully referred to the opinions of the Commission in the later cases involving management purchases, where the grounds of distinction are spelled out at length (R. 218-223, 237-246, 290-294, 18-22).[10]

Petitioners now rely particularly on the *Middle West* case because this case was decided after this issue of alleged administrative inconsistency was previously called to the attention of this Court. It is stated (p. 14, n. 4) that this case "served to round out the new doctrine." That case, however, rests upon a distinction of

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[9] See footnote 4, *supra*, p. 3.

[10] We might point out again that these same charges of inconsistency have previously been urged upon this Court in the petition for rehearing (R. 179-181) which this Court denied in 1947.

degree drawn in the *Chenery* case itself, since both in *Chenery* and in *Middle West* the Commission refrained from imposing the sanction of limitation to cost in the case of securities purchased prior to the reorganization proceedings, but when reorganization could have been anticipated. All purchases involved in *Middle West* were in this category (R. 292-293. See also fn. 4, *supra*).

The Commission still believes, as it argued in the *Chenery* case, that it is not feasible to anticipate and cover by an all-inclusive rule the varying situations in which the proper discharge of a fiduciary obligation precludes the fiduciary from engaging in conduct for personal profit because of the conflicting interest created by such collateral activity. At the same time the Commission is, and has been, conscious of the element of retroactivity in applying an ethical judgment after the event. The choice between these two conflicting considerations, although productive of differences of opinion in its application, is one which this Court has held to lie within the Commission's statutory responsibility, stating "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." (332 U.S. at 203).

Even if, contrary to our view, the post-*Chenery* decisions had been more lenient than the *Chenery* case in applying the Commission's policy of discouraging trading by fiduciaries in securities affected by a reorganization, this would at most indicate that there has been

heed for this Court's admonition to proceed with caution in exercising a choice of method within its statutory power. The Commission specifically adverted to this admonition in both the *Cities Service* case (R. 223) and the *American States* case (R. 240).[11]

2. The courts below properly held that petitioners were barred by the doctrine of *res judicata*. The instant plan awards the petitioners payment in full in cash for the precise amount of their interest in the reorganized Federal as determined, and litigated to final conclusion, in the earlier merger proceeding. Since this is an entirely separate proceeding from the original merger case reviewed by this Court, petitioners, in asserting rights as stockholders in the reorganized Federal, are seeking to relitigate in a new suit between the same parties the precise issue finally determined in the prior litigation. Petitioners seek a redetermination of their rights arising out of the very same transactions passed upon in the prior decisions—not to separable though similar transactions such as were involved in *Commissioner* v. *Sunnen*, 333 U.S. 591, 598.[12] We

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[11] That the Commission has not abandoned the policy of discouraging trading by fiduciaries in securities affected by reorganizations is evidenced *inter alia* by its briefs before this Court in Chapter X proceedings. See *Mosser* v. *Darrow*, October Term, 1950, No. 461, decided May 7, 1951; *Manufacturers Trust Co.* v. *Becker*, 338 U. S. 304; *Simonsen* v. *Emmerling*, certiorari denied, 339 U. S. 978.

[12] In tax cases, intervening facts and legal developments may result in the application of different principles to similar tax situations in subsequent years, but no one would contend that such new approach could be used to reassess the taxes for the years in which determinations had already been made—a contention more nearly analogous to the one appellants are making here. The other cases which petitioners cite (p. 18) as in conflict with the de-

believe it would be hard to find a clearer case for the application of the rule of *res judicata.*[13]

While petitioners concede that matters should not be relitigated "forever" (Pet. p. 21), they argue that the type of Commission determination here involved is rule-making, and apparently that any determination so categorized can never be finally adjudicated. The court below properly held, however, that in its proceeding in this case the Securities and Exchange Commission "was not laying down rules of conduct for the future in the exercise of its quasi-legislative power," but on the contrary "was acting in a quasi-judicial or adjudicatory capacity to determine the existing obligations and duties of the holding companies in question and the rights of their creditors and stockholders under the legal standards laid down in the Act and in the light of their past conduct" (R. 323). The court correctly

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cision below fully support the holding that petitioners are barred by *res judicata*. We agree that *res judicata* has only limited application to decisions on the fairness of rates which necessarily differ with changes in the basic economic facts. Similarly the availability of exemptions and the granting of licenses or certificates of necessity, are manifestly only temporary adjudications intended to be revised whenever changed conditions make the earlier holdings inappropriate. *The Evergreens* v. *Nunan*, 141 F. 2d 927 (C.A. 2), which petitioners also allege to be in conflict, is not sufficiently close to the present situation to warrant discussion.

[13] See *Angel* v. *Bullington*, 330 U. S. 183, 192-193, in which the opinion states: "The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion * * * And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties." See also *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Co.*, 325 U. S. 335; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371; *United States* v. *Smith*, 331 U. S. 469; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156.

concluded that when an administrative agency exercises power of this sort "and its order has been affirmed by the final judgment of a reviewing court, the rights and liabilities necessarily determined by the judgment of affirmance become *res judicata" (ibid). International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Co.,* 325 U.S. 335.

Petitioners' argument that the Commission's determination constitutes rule-making is predicated upon the definition of "rule" in Section 2(c) of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. § 1001 (c)) as including "the approval or prescription for the future of * * * corporate or financial structures or reorganizations thereof * * * services or allowances therefor * * *". Even assuming that the Administrative Procedure Act is applicable to this case,[14] it is apparent that its definition of rule-making was enacted only to serve as the basis for the procedural differentiations established in the Act itself. The definition was not intended to have any effect upon the doctrine of *res judicata,* a subject not considered by Congress in the Administrative Procedure Act or elsewhere.

Acceptance of petitioners' argument would mean not only that the treatment of Chenery would be open to reexamination, but that the allocations as between the various classes of public security holders of the old Federal Water Service Company would still be open to reexamination. Indeed, if petitioners are entitled to

[14] The earlier proceedings antedated the Administrative Procedure Act, and accordingly that statute would not apply to them. Section 12, 5 U.S.C. § 1011.

attack collaterally the determination of fairness as to them it is hard to see how any determinations of fairness could settle anything in the Commission's step-by-step simplification of holding company systems. *Cf. S.E.C.* v. *Central-Illinois Securities Corporation*, 338 U.S. 96, 140-142.

3. Federal Water and Gas, although it did not appeal from the order of the district court, supported the appeal below and supports the petition for a writ. Federal urges that the nature of the Commission's 1945 order, involved in the second *Chenery* case, precludes application to it of the doctrine of *res judicata*. This order had two parts, one of which reaffirmed as of its original date the 1941 order, set aside in the first *Chenery* litigation, which limited Chenery, et al. to a cash payment of $313,190.22. The other part of the Commission's 1945 order disapproved a proposal of Federal, made in the form of an amendment to the plan after its return to the Commission, to accord Chenery, et al. stock in the merged company on a parity with the public holders of the old preferred stock. Because the opinions of the Commission and this Court in both *Chenery* cases had emphasized the power and responsibility of the Commission to deny participation in a plan, except as affirmatively satisfied that such participation was in accordance with the applicable statutory standards, Federal, as well as petitioners, argued before the Court of Appeals for the District of Columbia that this Court's mandate in the second *Chenery* case did not warrant unqualified affirmance of both the affirmative and negative parts of the Commission's order. [R. 182-189] Al-

though that argument was rejected by the Court of Appeals, and no attempt was made to bring directly to this Court the controversy as to what the mandate required, Federal now seeks to raise the same issue collaterally. Such an attack is precluded by Section 24(a) which provides: "the judgment and decree of the [Court of Appeals] affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States . . ." *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Co.*, 325 U.S. 335 indicates that in such circumstances, under a similar review provision, the Commission itself would lack power to change its decision after affirmance by a reviewing court. In this case, the Commission was presented with a petition for rehearing, reconsideration, and modification after the order of affirmance, and without questioning its jurisdiction to change its ruling, declined to do so (R. 201). No review was sought of that order which was the last step in the merger proceeding.

Federal now urges that this Court in the second *Chenery* case "interpreted the Commission's order as making the findings necessary to support a self-executing 'negative' order" and that this Court did not have before it "the question of the legal rights of petitioners in a 'fair and equitable' reorganization under the Act." It is urged (pp. 9-12) that this Court merely upheld the power of the Commission to "pass a rule" which was allegedly abrogated on October 1, 1947 (the approximate date of the *Cities Service* and *American States*

decisions), since when "there has been no legal impediment to Federal's treating the stock of petitioners in the same way as other stock was treated." While we believe both these arguments were disposed of by the order of affirmance by the Court of Appeals for the District of Columbia, which was entered on December 12, 1947, after the alleged abrogation of the rule, they are in any event without merit. We find nothing in the language of this Court quoted by Federal, or elsewhere in its opinions, which supports the interpretation that this Court was merely rendering an abstract decision with respect to the Commission's power to deal thereafter with the holdings of Chenery et al. as distinguished from passing upon the correctness of the Commission's determination in the particular case which had already limited them to cost plus interest.[11] Moreover, Federal's argument opens up a vista of never-ending litigation with respect to administrative decisions based upon experience, on the ground that such experience "is constantly changing." (p. 14).

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[11] See for example the statement in the second *Chenery* opinion that—"The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in relation to the particular proposal before it. The Commission was asked to grant or deny effectiveness to a proposed amendment to Federal's reorganization plan whereby the management would be accorded parity treatment on its holdings. It could do that only in the form of an order, entered after a due consideration of the particular facts in light of the relevant and proper standards." (332 U.S. at 201). See also the dissenting opinion which states that the Commission "did not previously promulgate, and it does not by this order profess to promulgate, any rule or regulation to prohibit such purchases absolutely or under stated conditions." (p. 215).

CONCLUSION

This petition does not in our view raise any question calling for further review by this Court. The decision of the Court of Appeals was correct and there is no conflict of decisions. The petition should be denied.

Respectfully submitted,

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MEMORANDUM ON BEHALF OF FEDERAL WATER AND GAS CORPORATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

CHENERY CORPORATION, *et al.*,
Petitioners,
v.
SECURITIES AND EXCHANGE COMMISSION.

No. 709

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM ON BEHALF OF FEDERAL WATER AND GAS CORPORATION

Opinions Below

The opinion of the District Court is reported in *In re Federal Water & Gas Corporation*, 87 F. Supp. 289 (D. Del. 1949). The findings and opinion of the Commission (R. 7-32) are reported in Holding Company Act Release No. 8318 and the supplemental findings and opinion of the Commission (R. 34-42) are reported in Holding Company Act Release No. 8387. The opinion of the Court of Appeals (R. 317-326) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 2, 1951 (R. 327). Petitioners invoke the jurisdiction

of this Court under Section 1 of the Act of June 25, 1948, 28 U. S. C. § 1254(1) (Supp. 1949).

Question Presented

Whether the decision of this Court in *Securities & Exchange Commission* v. *Chenery Corporation,* 332 U. S. 194 (1947), is *res judicata* of the issues presented by paragraph 3 of the Plan of Liquidation.

Statutes Involved

Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935, 49 Stat. 822, 832 (1935), 15 U. S. C. §§ 79k(e), 79r(f) (1946), are printed in the petition at pages 2 and 4.

Since the decision of this Court in the prior proceedings also involved Sections 6 and 7 of the Public Utility Holding Company Act, we quote the pertinent parts of these sections. Section 6(a) of the Public Utility Holding Company Act provides:

> "Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company." 49 Stat 814 (1935), 15 U. S. C. § 79f(a) (1946).

Section 7(d) (6) provides:

> "If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that— * * * (6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors on consumers." 49 Stat. 816 (1935), 15 U. S. C. § 79g(d) (1946).

Section 7(e) provides:

> "If the requirements of subsection (g) are satisfied, the Commission shall permit a declaration to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers." 49 Stat. 816 (1935), 15 U. S. C. § 79g(e) (1946).

Statement

Federal Water and Gas Corporation (including the same corporation under its former name, Federal Water Service Corporation) herein referred to as "Federal" has filed four plans with the Securities and Exchange Commission, for the treatment of the preferred stock owned by petitioners and which was purchased by them during the period from 1937 to 1940 while plans of reorganization for Federal were on file with the Commission.

The first plan proposed the same treatment for the preferred stock of petitioners as was accorded to other preferred stock of the same class. This plan was held to contemplate the issuance of securities on terms that were detrimental to the public interest or the interest of investors and was not fair and equitable. 8 S. E. C. 893 (1941).

The second plan prohibited the issuance of common stock to petitioners in exchange for their preferred stock and provided that they should be entitled on surrender of their certificates of preferred stock to receive an aggregate amount of $313,190.22. This was held to be not detrimental to the public interest or the interest of investors or consumers and presumably fair and equitable. 10 S. E. C. 200 (1941). The order of the Commission permitting this plan to become effective was reversed by the Court of Appeals for the District of Columbia. *Chenery Corporation* v. *Securities and Exchange Commission*, 128 F. (2d) 303 (App. D. C. 1942), and the order of the Commission was set aside pursuant to the mandate of this Court. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80 (1943).

The third plan treated the preferred stock owned by petitioners in the same way as other preferred stock had been treated by the second plan. This was held by the Commission to be detrimental to the public interest or the interest of investors or consumers and not fair and equitable, 15 S. E. C. 849 (1944); 18 S. E. C. 231 (1945). The order of the Commission denying this plan also reaffirmed as of September 24, 1941, the order of the Commission approving the second plan. The reason given in the opinion and order for the reaffirmance was to remove any possible question about the legality of the securities which had been

issued under the second plan. The order of the Commission was reversed by the Court of Appeals for the District of Columbia, *Chenery Corporation* v. *Securities and Exchange Commission*, 134 F. (2d) 6 (App. D. C. 1946), but the order of the Court of Appeals was reversed by this Court, *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U. S. 194 (1947), rehearing denied, 332 U. S. 783 (1947). The Court of Appeals over the objection that the affirmative part of the Commission's order was not passed upon by this Court entered an order on December 12, 1947, affirming the order of the Commission of February 7, 1940 (R. 65a).

The fourth plan—the present one—is part of a plan of liquidation of Federal. It provides for the deposit of $313,190.22 in The New York Trust Company in full satisfaction and discharge of all claims of petitioners growing out of the acquisition of their preferred stock. This plan was held fair and equitable by the District Court for the District of Delaware (87 F. Supp. 289) on the ground that it was compelled to do so by the decision of this Court in the second *Chenery* case, and its decision has been affirmed by the Court of Appeals.

ARGUMENT

First: The second Chenery case is based upon the power of the Commission to pass a rule, not to make an adjudication. There is no question of res judicata in this case.

It was not clear from the opinion of the Commission of March 28, 1941, or the supplemental opinion of the Commission of September 28, 1941, whether the Commission's

order was based upon an alleged adjudication by the Commission of the legal rights of petitioners in a fair and equitable plan of reorganization under the Act, or whether the Commission was exercising its power under the Act to refuse to allow a corporation to issue securities under a reorganization plan upon terms that were "detrimental to the public interest or the interest of investors or consumers." From the statutory standpoint, paragraph Fourth (d) could possibly be looked upon as a condition inserted in the merger agreement in order that the merger agreement might be not detrimental to the public interest or the interest of investors or consumers within the meaning of Section 7. It also could be looked upon as a provision inserted in the merger agreement in order that the merger agreement might be fair and equitable to the parties affected thereby within the meaning of Section 11(e). Since whichever way it was looked upon, the order was not supported by the judicial precedents upon which the Commission relied, the order was set aside. It is plain from the minority opinion that it was considered that the Commission was preventing Federal from consummating a plan which the Commission could properly hold was "detrimental to the public interest or the interest of investors or consumers." Treating the opinion of the minority on the first review as the opinion of the majority on the second review, the opinion of the majority on the second review is perfectly clear when it said (332 U. S. 194, 196):

> "* * * On remand, the Commission reexamined the problem, recast its rationale, and reached the same result. * * *"

The result referred to is the refusal of the Commission, as indicated by its opinion of March 24, 1941, to approve

a reorganization plan which treated the stock owned by petitioners in the same way as other stock was treated and otherwise than on a basis of cost.

The question presented by Federal's application for leave to amend the merger agreement (the third plan) was the same as the question presented by the reorganization plan which was considered by the Commission in its opinion of March 24, 1941 (the first plan). It was not necessary for the Commission in the view of the Court to adjudge the legal rights of petitioners. It was only necessary to determine whether the Congress had authorized the Commission to take into consideration in determining whether a plan of reorganization or an amendment to the plan was detrimental to the public interest or the interest of investors the fact that the securities were purchased by fiduciaries while a plan was on file with the Commission and whether such circumstance justified a new rule or policy prohibiting benefits or profits to be obtained out of the approval by the Commission of the reorganization. Federal, in substance, had applied for a license to reorganize. The Commission felt that the license ought not to be granted except on conditions for the protection of the public interest. It had made an error of law in its first decision which was pointed out by the Court on the first review. This Court accordingly applied the principle of *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940), saying (332 U. S. at 200-201):

> "* * * The fact that the Commission had committed a legal error in its first disposition of the case certainly gave Federal's management no vested right to receive the benefits of such an order. See *Federal Communications Commission* v. *Pottsville Broad-*

> *casting Company,* 309 U. S. 134, 145. After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress. It was again charged with the duty of measuring the proposed treatment of the management's preferred stock holdings by relevant and proper standards. Only in that way could the legislative policies embodied in the Act be effectuated. *Cf. Labor Board* v. *Donnelly Co.,* 330 U. S. 219, 227-228."

Again (p. 201):

> "* * * The Commission was asked to grant or deny effectiveness to a proposed amendment to Federal's reorganization plan, whereby the management would be accorded parity treatment on its holdings. It could do that only in the form of an order, entered after a due consideration of the particular facts in light of the relevant and proper standards. * * *"

It is unnecessary to labor the point. The Court at no place indicated that the Commission's decison was "authorized" by Section 11(e) of the Act. The Court said (p. 207):

> "* * * Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is *consistent* with the authority granted by Congress. See *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 224" (Italics supplied).

The statement in the *National Broadcasting Co.* case to which reference is made is (319 U. S. at 224):

> "* * * Our duty is at an end when we find that the action of the Commission was based upon findings

supported by evidence and was made *pursuant* to authority granted by Congress. * * *" (Italics supplied).

The citation by this Court of the cases of *United States* v. *Lowden*, 308 U. S. 225 (1939), and *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373 (1942), both of which involved the use of conditions to an administrative approval in order to accomplish an object over which the Commission had no direct jurisdiction points in the same direction. Finally, it was not said by the Court that the decision of the Commission under review was within permissible limits of fairness and equity. This Court held merely that the Commission's decision was "a judgment that can justifiably be reached in terms of fairness and equitableness, to the end that the interests of the public, the investors and the consumers might be protected" (332 U. S. at 209).

This Court in the second *Chenery* case interpreted the Commission's order as making the findings necessary to support a self-executing "negative" order. The Commission did not make the findings in its opinion and order of February 7, 1945, which would present to this Court the question of the legal rights of petitioners in a "fair and equitable" reorganization under the Act. There is not a line in this Court's opinion which suggests that it was upholding an adjudication by the Commission of the legal rights of petitioners in a "fair and equitable" reorganization on the basis of its administrative experience. This Court held that the Commission had the power to establish a policy or pass a rule based upon its administrative experience. This rule was not retroactive. It took into consideration past events but not for the purpose of adjudicating

rights and liabilities but only for the purpose of establishing a new rule for the future prohibiting reorganization plans that treated stock purchased by officers or directors pending reorganization in the same way as other stock.

Because the Commission was not making an adjudication but was passing a rule, this Court held that the Commission's decision came within an area where Congress intended that the Commission's judgment was conclusive.

In *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 (1949), the Court said (p. 127):

> "Administrative determinations of policy, often based upon undisputed basic facts, in an area in which Congress has given the agency authority to develop rules based upon its expert knowledge and experience, are exemplified by *Securities and Exchange Commission* v. *Chenery Corp., supra,* in which the Commission determined that preferred stock purchased by management in the over-the-counter market during the formulation of a holding company reorganization plan could not be exchanged for common stock participation in the reorganized company, as could other preferred stock; instead management was to be paid cost plus interest for the preferred stock so purchased.
>
> "The Commission's determination was made in the exercise of its duty to determine that a plan is 'fair and equitable' within the meaning of § 11(e) and that it is not 'detrimental to the public interest or the interest of investors or consumers' within the meaning of § 7(d)(6) and 7(e). On certiorari to the Court of Appeals which had reviewed the Commission's order under § 24(a) of the Act, we held that the Commission's action was 'an allowable judgment which we cannot disturb.' 332 U. S. 194, at

209. This holding was not based upon the fact that the Commission's order was reviewed under § 24(a) of the Act rather than under § 11(e), but upon the ground that the Commission's determination was made in an area in which Congress had delegated policy decisions of this sort to the Commission, and therefore that the agency determination was 'consistent with the authority granted by Congress.' *Id.* at 207. We think this view is applicable when review is had under § 11(e) as much as when it arises under § 24(a)."

On the other hand, the Court below said (Op. p. 7):

"But in the reorganization and merger proceedings the Commission was not laying down rules of conduct for the future in the exercise of its quasi-legislative power. On the contrary it was acting in a quasi-~~legislative~~ JUDICIAL or adjudicatory capacity to determine the existing obligations and duties of the holding companies in question and the rights of their creditors and stockholders under the legal standards laid down in the Act and in the light of their past conduct."

The conflict between the decision of this Court and the decision of the Court below is clear.

The entire superstructure of the opinion of the Court below is based upon the independent judgment of the Court below as to what the issues were in the second Chenery case. But the opinion of this Court controls the meaning of its mandate and the opinion of this Court shows that it was determining that it was within the power of the Commission to adopt a policy by the exercise of its administrative experience—not to make an adjudication of the legal rights of petitioners as of October 31, 1941, in the reorganization of Federal Water Service Corporation.

In Prentis v. *Atlantic Coast Line Company,* 211 U. S. 210, 226 (1908), this Court said:

> "* * * A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.* * *"

Reference might also be made to *Arizona Grocery Co.* v. *Atchinson, T. & S. F. Ry.,* 284 U. S. 370 (1932), where this Court said (p. 389):

> "* * * The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is manifestly inapplicable to legislative action. * * *"

There is, it is submitted, no question of *res judicata* in this case. There was a rule which prevented Federal from treating the stock of petitioners in the same way as other stock was treated. This rule was in effect from February 7, 1945, to October 1, 1947, when the Commission interpreted the statutes so as to abrogate the rule. Since October 1, 1947, there has been no legal impediment to Federal's treating the stock of petitioners in the same way as other stock was treated.

Second: If this Court affirmed an order of the Commission holding "fair and equitable" the second plan, the decision of this Court was not *res judicata,* but was binding on the lower courts only as the "law of the case."

This Court in *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.,* 338 U. S. 96 (1949), rec-

ognized that the same plan might come before a court both under Section 24(a) and under Section 11(e). This Court said (p. 123):

> "Conceivably the same plan might be brought under review by both routes. Indeed, in one instance the District Court for Delaware, to which the plan here was submitted, held that its determination of the issues in a § 11(e) proceeding was precluded by a prior affirmation of the same order by a Court of Appeals in a § 24(a) review proceeding. See *L. J. Marquis & Co.* v. *Securities & Exchange Commission*, 134 F. 2d 822, and *Application of Securities and Exchange Commission*, 50 F. Supp. 965. * * *"

In the case cited, *Application of Securities and Exchange Commission*, 50 F. Supp. 965 (D. Del. 1943), the Court did not consider itself bound by the order of affirmance, except with respect to the issues actually passed upon by the appellate court. The District Court considered the applicable principle to be "the law of the case." There was no suggestion that the principle of *res judicata* was applicable (p. 966).

It was recognized by this Court in *Insurance Group Committee* v. *Denver & Rio Grande Western R. R.*, 329 U. S. 607, 611 (1947), that, even after a plan of reorganization has been confirmed on review, the bankruptcy court might nevertheless take cognizance of subsequent changes in conditions and order the plan reexamined.

It is submitted that the appropriate legal doctrine to be applied to an affirmance of an order approving a plan of reorganization after review under Section 24(a) is the "law of the case", not *res judicata*. The decision of the appellate court is binding on an enforcing court with respect to the points actually passed upon but not as to the points

that might have been passed upon. See *Hartford Life Insurance Co.* v. *Blincoe,* 255 U. S. 129 (1921). And the decision of this Court while binding upon the lower courts is not binding upon this Court. *Messenger* v. *Anderson,* 225 U. S. 436 (1912).

Third: The objections of petitioners to being deprived of their property where there is no rule could not be presented to this Court in the prior proceedings where the Commission claimed there was a rule. The present objections are therefore based upon new facts not available to petitioners in the prior proceedings and there is no estoppel by judgment.

It is not easy to see the application of the doctrine of *res judicata* to a decision that is based upon administrative experience. Since the experience of the Commission is constantly changing and it is the policy of the law not to estop the Commission by judicial judgment, the issues arising today are always different from those arising yesterday.

We also know of no authority applying the doctrine of *res judicata* to an affirmance of a Commission order where the affirmance is not based upon the independent judgment of the Court as to the "case or controversy" involved.

But treating from the standpoint of *res judicata* the decision of the Commission as affirmed, the issue which was before the Court in the amendment to the merger agreement proceedings was whether petitioners were entitled to be treated on the same basis as other stockholders when such treatment was in conflict with a policy adopted by the Commission for the protection of the public. This is a different issue from the claim of petitioners to be treated on the same basis as other stockholders when such treatment is not in

opposition to any policy. There are numerous cases holding that the principle of estoppel by judgment does not apply to claims or demands which were not available at the time the first judgment was entered. See 2 Freeman on Judgments (5th ed. 1925) §§ 712, 713; 50 C. J. S. "Judgments" § 650, p. 92, and § 712b, p. 180. Petitioners had no opportunity to contest the validity of an order of the Commission determining that it was fair and equitable to penalize them with respect to their purchases and not penalize officers and directors of other companies who purchased securities while a plan of reorganization was on file with the Commission. They could not raise this objection to the deprivation of their property by the Commission until after the decision of this Court was made. Correspondingly, Federal was defeated by the Commission and the Court in its application to amend the merger agreement because of the existence of a policy. When this policy was abandoned a new claim or demand came into existence which had not been passed upon by the Court.

In *Utter* v. *Franklin*, 172 U. S. 416 (1899), there was a petition for a writ of mandamus to compel the defendants to issue certain bonds in exchange for bonds issued in aid of a railroad. This Court had held the bonds invalid in *Lewis* v. *Pima County*, 155 U. S. 54 (1894). There was, however, curative legislation and in the subsequent suit, it was held that mandamus should have issued. With respect to the doctrine of *res judicata*, the Court said (172 U. S. at 424):

> "* * * The judgment in that case was *res adjudicata* only of the issues then presented, of the facts as they then appeared, and of the legislation then existing."

Here, the Commission stated that it had a rule or policy and this was held to be within the power of the Commis-

sion. It subsequently abandoned the rule or policy and there would be now no legal obstacle to another application for leave to amend the merger agreement. Federal, in justice to other stockholders, could not postpone its liquidation in order to present another plan (3a) before filing plan 4. But this would not affect the legal rights of petitioners.

Fourth: Federal Water and Gas Corporation is the same corporation as Federal Water Service Corporation.

Counsel for the stockholders protective committee made the point before the Court below that Federal Water and Gas Corporation was a separate corporation from Federal Water Service Corporation. Unfortunately the Court adopted the contention. The fact is that the merger was a true merger in which one corporation continues its existence. It was not a consolidation. Utility Operators Company and Federal Water and Gas Corporation were merged into Federal Water Service Corporation which continued its corporate existence, became the surviving company and adopted the name of Federal Water and Gas Corporation under the laws of Delaware. The facts are correctly stated by the Securities and Exchange Commission in the first opinion, 8 S. E. C. 893, 898 (1941). Paragraph Fourth(d) of the merger agreement should be looked upon as an amendment to the corporate charter of Federal Water Service Corporation.

This point is unimportant because if the rights of petitioners are to be judged in accordance with legal principles, it would make no difference what corporate machinery was used in order to "freeze out" them from their interest in the assets of Federal—whether by merger, *Outwater* v. *Public Service Corporation of New Jersey*, 103 N. J. Eq. 461, 143 Atl. 729 (Ch. 1928); consolidation, *Jones*

v. *Missouri-Edison Electric Co.*, 144 Fed. 765 (8th Cir. 1906); or sale of assets, *Southern Pacific Company* v. *Bogert*, 250 U. S. 483 (1919); *Geddes* v. *Anaconda Copper Mining Company*, 254 U. S. 590 (1921); *Ervin* v. *Oregon Ry. & Nav. Co.*, 20 Fed. 577 (C. C. S. D. N. Y. 1884); *Nave-McCord Mercantile Co.* v. *Ranney*, 29 F. (2d) 383 (8th Cir. 1928). Even where there was no "freeze out" but an amendment to a corporation charter was in violation of the vested rights of preferred stockholders, the preferred stock was treated as outstanding and not destroyed by the void amendment. *Keller* v. *Wilson & Co., Inc.*, 21 Del. Ch. 391, 190 Atl. 115 (Sup. Ct. 1936).

Petitioners, of course, have had no rights under the merger agreement since October 31, 1941, except to surrender their stock and receive $313,190.22. They have contended, however, that the merger agreement was invalid with respect to their stock and was not effective to deprive them of their vested rights of property in the assets of Federal. This contention cannot be answered by saying that the Commission prevented petitioners from becoming stockholders in Federal Water and Gas Corporation. Petitioners bought an interest in Federal Water and Gas Corporation and the question is whether the order of the Commission was effective to deprive them of it.

CONCLUSION

From a technical standpoint, it is submitted that the Court of Appeals has decided a federal question in a way probably in conflict with the applicable decision of this Court. The federal question is with respect to the jurisdiction of the Commission over the stock of officers and directors and controlling stockholders, which was purchased by them while a plan of reorganization was on file with

the Commission. The Court below has held that the Commission has jurisdiction to adjudicate on the facts in a particular case that, in a fair and equitable plan of reorganization, such officers and directors have no claims against the corporation except to recover cost. The decision of this Court, which is supposed to be the basis for this decision, goes no further than to hold that the Commission has power to deny an application by a corporation for approval of a reorganization plan or an amendment to the plan which treats such stock in the same way as other stock is treated, provided the denial is in pursuance of a rule or policy having applicability to purchases of stock by officers and directors of holding companies generally. The decision of this Court is based upon the power of the Commission to develop rules and the decision of the Court below rests upon the asserted power of the Commission to make an adjudication.

Apart from the technical aspects of the application for the writ, it is submitted that when this Court once takes a case on certiorari and a question arises in a subsequent proceeding as to the interpretation of its mandate, this Court should take the subsequent case on certiorari in order that its mandate shall be correctly interpreted and applied.

Respectfully submitted,

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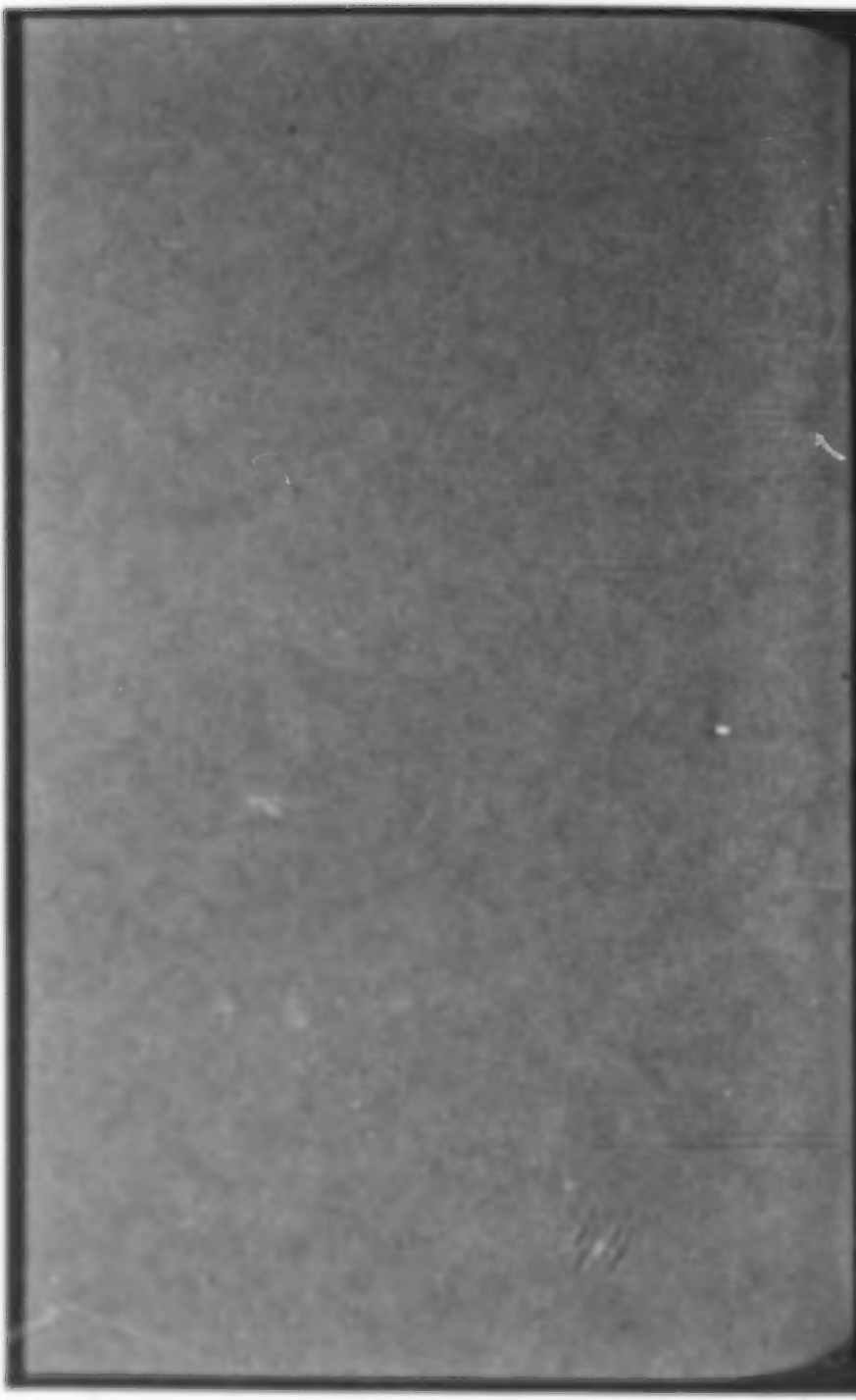
[redacted]



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 709

CHENERY CORPORATION, et al.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.

MEMORANDUM ON BEHALF OF FEDERAL WATER AND GAS CORPORATION COMMON STOCKHOLDERS' COMMITTEE, RESPONDENT

Preliminary Statement

This brief is submitted by respondent, Federal Water and Gas Corporation Common Stockholders' Committee, for the purpose of demonstrating that the petition of Chenery Corporation, et al., for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Opinions Below

The opinion of the Court of Appeals (R. 317-326) is not yet reported. The opinion of the District Court (R. 52-58) is reported in 87 F. Supp. 289. The opinions and orders of the Securities and Exchange Commission (R. 7-32; R. 34-38), dated July 2, 1948, and July 27, 1948, not yet officially reported, are contained in Holding Company Act Releases Nos. 8313 and 8387.

Jurisdiction

The jurisdiction of this Court is invoked under U. S. Code Title 28, Section 1254(1).

Questions Presented

(1) Whether petitioners may collaterally attack the final decree of the Court of Appeals for the District of Columbia, entered pursuant to the mandate of this Court in *Securities and Exchange Commission* v. *Chenery Corporation,* 332 U. S. 193, affirming the order of the Securities and Exchange Commission issued February 7, 1945.

(2) Is a plan under Section 11(e) of the Public Utility Holding Company Act of 1935 that provides for prior payment in full and in cash of creditors' claims fair and equitable as to them?

Statement

This respondent appears on behalf of the public holders of the outstanding 976,303 shares of common, the only class of stock of Federal Water and Gas Corporation outstanding. This is the stock that was issued to those, other than petitioners Chenery Corporation and others (Chenery et al.), who formerly held the preferred stock of Federal Water Service Corporation, pursuant to a plan filed by the latter corporation under Section 7 of the Public Utility Holding Company Act (Act) for its reorganization by merger with Federal Water and Gas Corporation and Utility Operators Company. That plan was amended to provide that in lieu of receiving new stock of the corporation resulting from the merger (new Federal Water and Gas Corporation), Chenery et al. should have only a claim against that corporation for the cost of their old Federal Water Service Corporation preferred stock, with interest

to October 31, 1941 (the effective date of the merger plan), a total of $313,190. The merger plan was approved by order of the Securities and Exchange Commission (Commission) on September 24, 1941. That order having been set aside by this Court and the case remanded to the Commission for further proceedings,[1] the Commission entered an order on February 7, 1945, reapproving, as of September 24, 1941, the amended reorganization plan.[2] Finally, pursuant to a mandate of this Court upon a second appeal by Chenery et al.,[3] the Court of Appeals for the District of Columbia on December 12, 1947, entered an order affirming the Commission's order of February 7, 1945 (R. 65).

The stockholders represented by this respondent constitute (1) those who in the merger proceedings consented to the merger upon the petitioners' express agreement (which, by these proceedings, the petitioners continue to violate) that, in the event it should be "finally determined that said order . . . shall be affirmed", they, the petitioners, would surrender their stock for cost plus interest, as provided in the merger agreement (R. 13, fn. 6); and (2) those who subsequently bought their stock in the public market from such original recipients in reliance upon the orders of the Commission, affirmed by this Court (332 U. S. 194), which adjudged petitioners to be creditors, not stockholders, of Federal Water and Gas Corporation.

In consequence, the present common shareholders of Federal Water and Gas Corporation, represented by this respondent in these dissolution proceedings, are the equitable owners of and entitled to receive the assets of their corporation, subject only to the prior payment to peti-

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[1] *Securities and Exchange Commission* v. *Chenery Corporation et al.*, 318 U. S. 80 (1943).

[2] *Federal Water Service Corporation*, Holding Company Act Release No. 5584.

[3] *Securities and Exchange Commission* v. *Chenery Corporation et al.*, 332 U. S. 194 (1947), rehearing denied, 332 U. S. 783 (1947).

tioners (creditors who are not and never have been stockholders of their corporation) of the sum of $313,190, heretofore adjudged to be due petitioners in consequence of their having been preferred stockholders of the old and now defunct merged Federal Water Service Corporation.

ARGUMENT

(1) Petitioners urge that the question presented by their present application is whether the Court below gave proper effect to the decisions of this Court in the first and second Chenery cases. In reality, however, the question presented is whether the Court below gave proper effect to the *mandate* of this Court in the second Chenery case by refusing to permit a collateral attack by petitioners upon that mandate, which adjudicated them creditors of Federal Water and Gas Corporation in the sum of $313,190. Recognition of this distinction exposes the basic fallacy in petitioners' presentation. The opinion of this Court, as it articulates the reasons for its ultimate determination or states principles of general application, is of importance when it is to be used as a basis for a like result in a case involving different parties or other facts. But here the important factor is not the reason for this Court's prior adjudication but rather the adjudication itself.

By the mandate as followed by the Court of Appeals for the District of Columbia, this Court has adjudicated that petitioners are entitled only to claim against the assets of Federal Water and Gas Corporation as creditors and not as stockholders. The Court below in holding that petitioners could not collaterally attack the adjudication of their creditor status and that a plan that provided for payment in full of their creditor claim was fair and equitable determined nothing new or novel—determined nothing of which this Court should take jurisdiction.

The opinion of the Court below (R. 317-326) contains an able and conclusive answer to petitioners' efforts to avoid

the impenetrable bar of res judicata in this collateral attempt by them to relitigate their claim previously adjudicated. Rather than here documenting the reasons why that effort must fail, for brevity we respectfully refer this Court to the opinion written by Judge Maris for the Court of Appeals (R. 317-326).

(2) But even if the prior adjudication were not a conclusive bar, the equities of the situation require the conclusion that the status of petitioners as previously determined should not presently be disturbed. Petitioners are here attempting to invade property rights of the Federal Water and Gas Corporation stockholders as the sole owners of the equity in that Corporation. These rights were acquired: (a) as the result of approval of the merger by cestuis stockholders in reliance upon the commitment of petitioners (R. 13, fn. 6), their officers and directors, to deliver up their preferred stock holdings in old Federal Water Service Corporation for cancellation and accept a creditor claim status in the new Federal Water and Gas Corporation as awarded them by the Commission's order of September 24, 1941, approving the merger (R. 111), conditioned only upon it being finally determined that the Commission's order should be affirmed—as it was; and (b) by acquisition in the public market as innocent purchasers for value and in reliance upon the prior adjudication of the Commission, affirmed by this Court, of the stock issued in consequence of the merger approved by the prior stockholders in reliance upon petitioner's commitment, as last stated.

Attempting to disregard rules of res judicata, petitioners appealed below to the sound discretion of the Commission to reopen the old and completed merger proceeding and reconsider the equities which petitioners claim attached to their acquisition, while officers and directors of the defunct merged Federal Water Service Corporation, of its preferred stock; equities, petitioners contended, that should have moved the Commission and should now move this

Court to grant petitioners parity with other former preferred stockholders of Federal Water Service Corporation in the award of common stock of the present merged corporation under the merger plan (though the latter expressly provided otherwise) and to revoke the previous adjudications that gave petitioners a creditor and denied them a stockholder status in the present corporation.

But, absent any other consideration, the estoppel that flows from action taken in reliance upon this record bars such a plea. Petitioners agreed to be bound by an affirmance of the Commission's order; they expressly so represented to their former fellow Federal Water Service preferred stockholders in an effort to, and did thereby, induce them to vote for and cause the adoption of the plan of merger; petitioners expressly, as part of such representation and inducement, agreed, in the event of affirmance, to deliver up their stock for the $313,190 that has since been awaiting them; the condition for such delivery and cancellation of their old Federal Water Service stock occurred and has been an undisturbed and undisturbable fact since December 12, 1947; and these respondent stockholders, having relied thereon, petitioners are estopped from making claim upon their defunct certificates—pieces of paper which have no validity except as objects for cancellation concurrently with petitioners' acceptance and receipt of the $313,190 they agreed to and have consistently refused to accept.

Another simple equitable maxim must defeat this claim, were the doctrine of res judicata not an absolute bar—the maxim that equity regards that as done which ought to be done. Petitioners' present appeal to equity—could it be entertained—must meet the bar that petitioners are not and never have been holders of stock of the present merged Federal Water and Gas Corporation, that they were adjudged creditors thereof, that when their $313,190 was tendered to them, that money became (and is now) theirs and the stock certificates they held became (and

are now) nugatory. Had petitioners surrendered, for purpose of record cancellation, their otherwise worthless Federal Water Service preferred stock certificates, and accepted the $313,190 which was and has been held available to them, they would not now be in a position to present their present contention. And that is the very thing they expressly undertook to do, and the fact that instead, they violated their undertaking and withheld surrendering their stock certificates can give them no greater rights in equity than they would have had, had they faithfully abided by their commitment.

CONCLUSION

WHEREFORE, for the reasons stated, i.e., first, because of the equitable bar of the principle of res judicata, and, second, by reason of the principles of estoppel, respondent submits that this Court should deny petitioners' application for a writ of certiorari.

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